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May 19, 2017

Via Email

Jeff S. Jordan
Federal Election Commission
999 E. Street, N.W.
Washington, DC 20463
CELA@fec.gov

Re: MUR 7239

Dear Mr. Jordan:

I write on behalf of The Washington Post (the "Post") in response to the April 16, 2017 letter filed with the Federal Election Commission ("FEC") by Kerry D. Bowers, which the Post received on May 4 (the "Complaint"). The Complaint concerns a March 22, 2015 item posted in "The Fix," one of the Post's political analysis and commentary blogs, entitled "Ted Cruz is starting with less prior-year support than anyone since Bill Clinton." See Complaint Ex. A (the "Article"). The Article referred to Senator Cruz as "the first legitimate candidate to officially enter the Republican primary field for 2016," and analyzed his polling numbers. *Id.* Bowers gripes that because the Article failed to recognize that he announced his own presidential candidacy before Senator Cruz, the Article constituted "a contribution to the campaign" of Senator Cruz in violation of 11 CFR § 100.73(b). Complaint at 1.

The Complaint lacks any merit whatsoever and should be dismissed for two independent reasons. First, the Complaint is belied by the overarching, fundamental "press exemption" of 11 CFR § 100.73, which it entirely ignores. The exemption clearly states that "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any [news media] is **not a contribution**, unless the facility is owned or controlled by any political party, political committee, or candidate." 11 CFR § 100.73 (emphasis added). Second, even absent this specific press exemption, the Post's reporting on a senator's presidential candidacy is squarely protected from government regulation by the First Amendment. The Post respectfully requests that the FEC find that this frivolous Complaint does not set forth a possible violation worthy of the FEC's attention.

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I. The Complaint Should Be Dismissed Because the FEC's Press Exemption Expressly States That the Cost of "Covering or Carrying a News Story" in a "Newspaper" or "Web Site" Like the Post "Is Not a Contribution."

The Complaint cannot withstand even simple scrutiny of the plain text of the regulation Bowers claims the Post violated. This regulation provides:

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"Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story: (a) That represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution."

11 CFR § 100.73 (emphasis added). This provision, along with its statutory companion codified at 52 U.S.C. § 30101(9)(B), are collectively referred to as the FEC's "press exemption." *See, e.g.,* Advisory Opinion 2016-01 (Ethiq., Inc.). The plain text of the FEC's press exemption bars Bowers' claim. There can be no serious dispute that the Post is a "newspaper" and "Web site" within the broad sweep of the press exemption; indeed, the Complaint concedes that the Post is a "widely-circulated and reputable news source." Complaint at 2. And the Post is not "owned or controlled by any political party, political committee, or candidate." 11 CFR § 100.73. Therefore, "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial" by the Post "is not a contribution." *Id.*

The FEC press exemption is dispositive and should end the inquiry. Courts have made clear that where, as here, "the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint." *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981); *see also Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) ("[U]nless the press exemption [is] found inapplicable, the FEC is barred from investigating the substance of the complaint."); Advisory Opinion 2005-16 (Fired Up) (favorably citing *Phillips Publishing* and *Reader's Digest*).

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Nothing Bowers alleges in the Complaint alters this basic analysis. The Complaint focuses exclusively on the “equal coverage” prong of 11 CFR § 100.73’s subsection (b). Complaint at 1. But the “equal coverage” component does not even enter the equation unless the publisher is “owned or controlled by any political party, political committee, or candidate,” in which case it is one of the two criteria for determining whether the press exemption must still apply. 11 CFR § 100.73. It is completely irrelevant otherwise. Thus, to the extent there is any legal analysis in the Complaint, it is inapt.¹

Moreover, even if there were some ambiguity in the text (and there is none), it would be resolved in favor of the Post. The legislative history of the press exemption shows that Congress intended for it to “assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, p. 4 (1974). The fact that the Post even has to defend its presidential campaign coverage against such a Complaint is proof that Bowers seeks to infringe upon its “unfettered right.” The FEC should not permit the Complaint to defy Congress’s express and specific intent, much less the plain text of the regulation at issue.

II. The Complaint Is Barred by the First Amendment, Which Squarely Protects News Coverage of Political Campaigns.

Even if the FEC press exemption were not formally codified, the Post’s presidential campaign reporting would nevertheless be protected from government interference by the First Amendment. The Supreme Court has long recognized the “practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.” *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (holding that an Alabama statute—which criminalized the publication of a newspaper editorial on election day that urged people to vote in a particular direction—violated the First Amendment protections of free speech and press).

The Complaint suggests that the Post could have avoided violating 11 CFR § 100.73 by “acknowledg[ing] that there were 55 other Republican candidates.” Complaint at 2. However,

¹ Indeed, the FEC has made clear that the content of a news article does not affect the applicability of the press exemption. See Advisory Opinion 2005-16 (Fired Up) (“[A]n entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office.”).

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this kind of content requirement, if enforced by the FEC, would constitute government interference with a newspaper's editorial control and judgment, which is absolutely prohibited by the First Amendment. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

Indeed, these very First Amendment concerns are precisely what motivated Congress to enact the FEC press exemption in the first place. Congress made clear that the Federal Election Campaign Act should not "limit or burden in any way the first amendment freedoms of the press and of association." H.R. Rep. No. 93-1239, p. 4 (1974). Courts have recognized that the FEC must be particularly mindful of these First Amendment concerns because "freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation." *Reader's Digest*, 509 F. Supp. at 1214; *see also Phillips Pub., Inc.*, 517 at 1314 (warning that "further FEC inquiry would impinge upon First Amendment freedoms"). It would be unconstitutional for the FEC to seek to regulate the Post's political coverage, including the story at issue here.

* * *

The self-evident statutory and constitutional deficiencies in the Complaint make clear that it is not deserving of further FEC attention. In the face of two dispositive defenses, the Complaint fails to provide "reason to believe" that a violation occurred. 52 U.S.C. § 30109. To the extent that Bowers feels slighted that he was not recognized as a "legitimate" presidential candidate in a news article, the proper remedy is free speech, not an enforcement action through the FEC. Any other ruling would violate the First Amendment and open the door to FEC proceedings whenever a candidate for elected office believed he or she had been treated unfairly by a news organization. The Complaint should be dismissed.²

Sincerely,



Nicholas G. Gamse

² To the extent that Bowers has filed a separate complaint about the Article individually against Post reporter Philip Bump, the same reasons for dismissal apply.